IN THE HIGH COURT OF JUDICATURE AT BOMBAY
ORDINARY ORIGINAL CIVIL JURISDICTION
Writ Petition No.457 of 2007.

Gulab Rameshnath Khote
res. at B-607,
36 Avishkar Building,
Khatavwadi Tenant Co-op. Housing
Society Ltd,
Grant Road,
Mumbai 400 007. ..Petitioner

versus

1. State of Maharashtra

2. The Agricultural & C-op. Department,
Mantralaya, Mumbai.

3. The Secretary,
The Agricultural & Co-op. Department,
Mantralaya, Mumbai.

4. The Advocate General,
State of Maharashtra.
..Respondents

Mr.A.V.Anturkar for the Petitioner

Mr.A.A.Kumbhakoni,Associate Adv. General for the Respondents 1 to 3

Coram : B.H.Marlapalle &
S.R.Sathe, JJ.
Dated : 27th Nov., 2007

JUDJMENT (Per S.R.Sathe, J).

1. Being aggrieved by the provision made in Section 73(1AB) of the Maharashtra Co-operative Societies Act, 1960 (hereinafter referred to as the

said Act) that the member who fails to execute such bond within a specified period shall be deemed to have vacated his office as member of the Committee, the petitioner has filed this Writ Petition under Article 226 of the Constitution of India, 1950 and prayed that the said provision be declared ultra vires.

2. Brief facts giving rise to this Writ Petition are as under:

. There is a Co-operative Housing Society by name Khatauwadi Tenants Co-operative Housing Society Limited (hereinafter referred to as KTCH Society) at Grant Road, Mumbai. Election for the Managing Committee of the said KTCH Society took place on 16.2.2005 and 8 members were declared as elected. The Petitioner is one of the elected members. One Mrs. N.M.Kumta was removed from the post of Chairman of KTCH Society. Some litigation was going on between the said Kumta and the society. During the inquiry of the said proceeding, the petitioner and other members of the Managing Committee of KTCH Society came to know that it was necessary for them to give a bond within 15 days as per the provisions

of Section 73 (1AB) of the said Act. Realising the mistake or default committed by them, the petitioner and two other members of the Managing Committee of the said KTCH Society executed a bond and handed over the same to the Deputy Registrar of Co-operative Society, D Ward.

3. The relevant provisions are as under

Section 73 (1AB)

> The members of the committee shall be jointly and severally responsible for the decisions taken by the committee during its term relating to the business of the society. The members of the committee shall be jointly and severally responsible for all the acts and ommissions detrimental to the interest of the society. Every such member shall execute a bond to that effect within fifteen days of his assuming the office, in the form as specified by the State Government by general or special order. The member who fails to execute such bond within the specified period shall be demand to have vacated his office as a member of the committee.

Rule 58A reads as under:

> **Bond to be executed by elected members of Managing Committee:-** Every elected member of the Managing Committee shall execute a bond in Form M-20 within fifteen days of his assuming the office. Such bond shall be executed on the stamp paper as provided under the Bombay Stamp Act, 1958. The expenditure on stamp paper shall be borne by the society. The Chief Executive

> Officer/Secretary of the Society shall receive such bonds and keep them on record of the society and accordingly inform the Registrar within fifteen days from formation of the Committee.

After coming to know the above provisions the petitioner felt that the above mentioned provision has the effect of nullifying the election which was held in a democratic way and after spending considerable time and money. According to petitioner, the provision whereby it was said that the member who has failed to execute a bond within specified period shall be deemed to have vacated his office as a member of the Committee, was in fact illogical, particularly, when in earlier part of the said section it was clearly stated as to what would be the liability of the members of the Managing Committee. According to the petitioner, he and other members did not execute the bond within specified period because they were not at all aware of the said provision. According to the petitioner, the effect of non execution of the said bond mentioned in the provision is very harsh and if this section is to be implemented scrupulously then the management of thousands of societies would be required to be taken over by the administrators.

Hence, the petitioner has filed the present petition and prayed that a Writ of Mandamus or Writ in the nature of mandamus or any other appropriate direction under Article 226 of the Constitution of India, 1950 be issued and above mentioned portion of Section 73 (1AB) of the said Act be struck down. The Petitioner also prayed that the petitioner and the Managing Committee members be allowed to hold the office till their present term of the office expires.

4. One D.S.Yempalle, Officer on Special Duty, Department of Co-operative and Textile, filed affidavit on behalf of respondents and opposed the petition. The respondents contended that the above mentioned provision is to be read alongwith Rule 58 of Maharashtra Co-operative Society Rules, 1961 and the Rules amended by the Maharashtra Co-operative Society (Amendment Rules), 2002.

5. The Respondents contended that the petitioners have not shown as to how the above mentioned provision transgresses any of the constitutional provisions. In fact, the legislature having experienced and realised that the members of

the Managing Committee of different societies are acting in most arbitrary and careless manner, with a view to have some accountability amongst the members of the Managing Committee, the above mentioned provision has been made by the legislature. It was contended that as a result of the provision with regard to execution of a bond, the intention of the legislature is to make the members fully aware of their personal responsibility/liability. The respondents also contended that the above mentioned provision or rather the time limit prescribed in the same is mandatory and not directary. The respondents, therefore, contended that there is no scope for the court to interfere and grant any relief under Article 226 of the Constitution of India in the present petition.

6. Shri Anturkar, learned Advocate for the petitioner has urged three points before us. Firstly, he submitted that when the first part of the above mentioned provision was clarifying the liability of the member of the Managing Committee, there was no necessity of directing the members to execute a bond and that too within a stipulated period and then to provide penalty for non execution

of the said bond. According to him, even if such bond is not executed, still then if any default or fraud is committed by the member, then the member is certainly liable and accountable. So, when even in the absence of non execution of a bond, a member can be held responsible or liable and accountable, there was no necessity to provide harsh punishment of ceasation of his membership. He, therefore, submitted that the above mentioned later portion of the provision is in fact redundant and if the same is read with the aims and objects of the said Act, then it is in fact creating hindrance in achieving the object of the said Act. Secondly, he canvassed before us that the period mentioned for executing a bond has also no basis and it is arbitrary. According to him, this provision, can at the most be read as directary and it cannot be treated as mandatory. Lastly, he submitted that though it has been mentioned in the said provision and the rule that the member has to execute a bond as per the provisions of Bombay Stamp Act, 1958, one is not even in a position to know for how much amount the bond has to be executed. Whether it has anything to do with the assets of the society or the over all financial position of the society. He, therefore,

initially submitted that the above mentioned provision be struck down. However, subsequently he submitted that he is not presently pressing the point with regard to vires of the said provision and only restricting himself for the relief that the petitioner and the other members be allowed to hold the office till their tenure expires, as they have already submitted the bond. The learned advocate also submitted that before giving effect to this later portion of the said provision, it is in fact necessary to have inquiry as to whether in fact the members have committed default in executing a bond and for that purpose it is necessary to hold enquiry under Section 78 of the said Act.

7. As against this, Shri Kumbhakoni, learned Addl. Advocate General submitted that this Court has already held that the provision of Section 73(1AB) of the said Act are is ultra vires and the said provision is certainly mandatory and not directary. He also submitted that the bond to be executed as per Rule 58 of the Maharashtra Co-operative Society Rules and the provisions of the Bombay Stamp Act, 1958, the member can submit such bond on a stamp of Rs. 100/-. He, therefore,

submitted that in the instant case the petitioner has admittedly not submitted the bond within the specified period and hence there is no question of granting any relief to the petitioner in the present petition and the petition be rejected.

8. From the averments in the petition and the submissions made before us, it appears that the attempt of the petitioner is to show that the above mentioned provision and in particular later portion of the said provision whereby the member is called upon to execute a bond within specific period and effect of such non execution is concerned, the same is ultra vires. It is needless to say that it is well settled that there is always presumption in favour of the constitutionality of the enactment and the burden is upon him who alleges otherwise to show that there has been clear transgression of the Constitutional principles. The Apex Court has also time and again emphasized that it must be presumed that the legislature understands and correctly appreciates the needs of his own people and laws are made to solve the problems faced in proper implementation of the Act. Bearing in mind the said principle, if we see the averments in the petition,

as well as the submissions made by the learned advocate for the petitioner, it appears that not even a single specific ground is shown by the petitioner on the basis of which it can be said that the above mentioned provision is ultra vires. On the contrary, having realised that in many societies the members of the Managing Committee exercise their powers indiscriminately the above section has been added.

9. Shri Anturkar, learned Advocate for the Petitioner submitted that the provisions contained in later portion of Section 73(1AB) of the said Act is not mandatory. For that purpose he ha placed reliance on a case **Salem of Advocates Bar Association vs. Union of India (2005) 6 SCC 344.** We have carefully gone through the said ruling. At the outset it must be mentioned that the facts of the said case and the facts of the case in hand are totally different. There was no question of considering the provisions of Section 73(1AB) of the said Act, but it was a case where the Apex Court was considering the provisions of Section 35, 35A of Civil Procedure Code, 1908 and Order VIII Rule 1 of CPC. So, the above said ruling is of no use to the

present petitioner.

10. Shri Anturkar, learned Advocate for the petitioner has also drawn our attention to a case **Keshavrao Patil vs. District Deputy Registrar & Others 1987 (3) Bombay Cases Reporter, 225** wherein the Division Bench has held that where no order of removal was passed under Section 78 in the matter of incurring disqualification of "A" under Section 73ff (1) the order of ceasation of membership of "A" under Section 73ff(2) would be invalid as the passing of Order of removal as required under provisions of Section 78 in the matter of incurring disqualification under Section 73ff(1) is not automatic. It must be noted that in the above cited ruling Their Lordships were not considering the issue as to whether the provision of Section 73(1AB) was mandatory or directory. Besides this, as in the said case enquiry under Section 78 was necessary Their Lordships observed that ceasation of membership is not automatic under Section 73ff(2) of the said Act. Hence, the above cited ruling is also of no use to the present petitioner.

10. Shri Kumbhakoni, learned Addl. Advocate

General has placed reliance on a case **Assissi Co-op. Hsg. Soc. Ltd. & Ors. vs. State of Maharashtra and others,** wherein while deciding the appeal No 683 of 2006 the Division Bench of this Court has clearly observed that the provision of Section 73(1AB) is not directory, but it is mandatory. We are in full agreement with the view expressed by the Division Bench of this Court in the above matter. So, relying upon the said ruling we hold that the said provision is mandatory.

11. The petitioner has tried to submit that he was not aware of the above mentioned provision and as such he did not execute the bond. However, it is needless to say that ignorance of law cannot be the excuse. So, there is no substance in the argument that as the petitioners have executed the bond after the period mentioned in the provision they can be allowed to hold the office. It is needless to say that the moment the period of 15 days was over, the petitioner and other members who had not executed the bond in time have ceased to be members. Merely because the punishment or penalty or consequence provided under the said provision for non execution of the bond in time is harsh, it cannot be said that

the said provision is ultra vires or that this court can ignore the said time period.

12. It is tried to be suggested on behalf of the petitioner that though the member is required to execute a bond there is no clear cut provision indicating as to the value of the stamp on which the bond is to be executed. Firstly, it must be noted that the bond contemplated under this provision only means binding agreement. So, it need not be on the basis of the assets of the Society or the financial position of the society. Schedule I of the Bombay Stamp Act, 1958, lays down the stamp duty required to be paid in respect of different bonds. As described in Clause 5(B) of the said Schedule when the stamp duty paid for particular agreement is not otherwise provided in the schedule then the proper stamp duty is Rs.100. So, there is no substance in the argument advanced by the learned advocate for the petitioner that there is some lacuna in the provision of the said Act and Rule 58.

13. In the instant case there is no question of holding any enquiry under Section 78 of the said Act to find out as to whether actually bond has been

executed by the petitioner and whether the same has been forwarded to the concerned authority by the Secretary in time, because the petitioners themselves have clearly admitted that they have not executed a bond within 15 days, but they executed the same after lapse of about one year. So, it is not open to the petitioner to submit that there is no breach of the above mentioned provision.

14. Thus, looking to the case from any angle, it is very clear that the petitioner is not entitled to get the relief as prayed.

15. In this view of the matter the petition is rejected.

(B.H.Marlapalle,J.)

(S.R.Sathe, J.)